

Too much information

Social media can impact litigation, if you're willing to look hard enough

Technology

By Carol Lundberg

When J. Stott Matthews reflects on the "good old days" of his career, he doesn't have to look back too far.

It was only a few years ago when, if he was helping a lawyer client track down electronic data during discovery, he only had to look as far as stored or deleted e-mail on someone's desktop computer.

Those days are gone.

"If you've been used to having e-mails on the computer in full form, that happy place doesn't exist anymore," said Matthews, managing partner of Franklin-based Spectrum Computer Forensics and Risk Management LLC, a litigation support and computer forensics services firm.

Now, they're in what he calls "the cloud," internet-based storage of data.

And in some ways, the amount of information that could be mined from the cloud is helpful for lawyers building a case. But it's also a burden.

"Who knows who owns what? It's not like you're looking for a piece of paper stored in a filing cabinet," Matthews said. "It's quite possible that the information is

on a third-party or a non-party's asset."

It was tough enough when trying to chase down relevant e-mails and text messages became an issue during discovery, said Patrick G. Seyferth, partner at Bush Seyferth & Paige PLLC in Troy.

But social media and its impact on litigation is what he calls explosive.

"Nothing is unaffected by it," he said, "and litigation is *really* affected by it."

Seyferth will moderate a panel discussion, "Social Media and its Impact on Litigation," for the Federal Bar Association on April 15 at Wayne State University Law School.

There are a lot of unknowns about how social media can impact litigation, he said.

It used to be that some firms would call on jury consultants and handwriting experts to help lawyers decide how to use their peremptory strikes.

"Now, do we pull up juror information on Facebook? Is that a good idea?" he said.

And at the discovery phase, he wonders, "If you can find information that was never available before social media, the question becomes, must you find it? It's like going through someone's trash. In some states, you're allowed to do that. In some states you're not."

The answer to how much information you should mine from social media sources is going to depend on the case, Matthews said.

"The answer comes down to the value of the case," he said. "If it's national security, the federal authorities will do everything and anything possible.

"But we in the civil sector need to look at what the stakes are and how timely we can get the information

and how many resources we have to do it."

It's not like searching a laptop or a desktop, which is less mobile — or not mobile at all — and never changes hands.

"People often have more than one cell phone or Blackberry or iPhone, and it gets passed around and used by other people," Matthews said.

So, gaining access to all potentially responsive information on every electronic communication device that could have possibly touched a case is a highly labor-intensive and costly.

And you might never actually find exactly what you're looking for, he said.

"Let's say I believe opposing party has critical e-mail we need to look at," Matthews said. "You have to look for artifacts on cell phones, iPhones and Blackberry phones. You still may never see the e-mail at the crux of the issue. You may have only artifacts," or records that show that calls were made, and messages were sent, even if the messages were deleted and no longer available.

But when the messages can be found, they can have a huge impact on a case, said John F. Birmingham Jr., partner at Foley & Lardner LLP in Detroit.

In one case, he was representing an employer in a sexual harassment suit. He was able to track down electronic messages by the plaintiff, and show that what she was saying to friends about whether the sexual advances were unwelcome was different than what she was saying in her suit.

"When what they're saying to the world is very different than what they're saying in a lawsuit, that can detract from someone's credibility," Birmingham

said.

And in this case, it did.

Social media can be particularly helpful in tracking down witnesses, Birmingham added.

As a labor and employment lawyer, Birmingham represents companies that face litigation after a reduction in force. When those reductions are large, it's often hard to find former employees because they've left the state to pursue other work opportunities.

But, Birmingham has been able to find witnesses in a wrongful discharge suit using Facebook, and in one case he tracked down a former employee who, after a mass layoff, found work on the West Coast.

"He was a decision-maker who was working for the company at the time of the layoff," Birmingham said. "He wound up being our main witness."

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